IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 940 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NARAN LAXMAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 940 of 1996

MRS SHILPA J UNWALLA for Appellant

MR SUDHANSU S PATEL, ADDL.PUBLIC PROSECUTOR for Respondent

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 14/07/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 378 of the Code of Criminal Procedure, 1973, ("the Code" for short) is directed against judgment dated August 13, 1996, rendered by the learned Additional Sessions Judge, Junagadh, in Sessions Case No.52 of 1994, by which the appellant is convicted of the offences punishable under Sections 302, 449, 450 & 452 of the Indian Penal Code and sentenced to suffer R.I. for life and fine of Rs.2000/-, in default, R.I.for six months, for having committed offence punishable under Section 302 I.P.C. as well as R.I. for ten years and fine of Rs.1000/-, in default, R.I. for three months, for commission of offence punishable under Section 449 I.P.C. and R.I. for seven years and fine of Rs.800/-, in default, R.I. for two months, for commission of offence punishable under Section 450 I.P.C. as well as R.I. for five years and fine of Rs.500/-, in default, R.I. for one month, for commission of offence punishable under Section 452 I.P.C. It may be stated that the learned Additional Sessions Judge has directed that the substantive sentences imposed on the appellant shall run concurrently and that he shall be entitled to benefit of set off as provided in Section 428 of the Code.

2. Complainant Bhavnanand Guru Narmadanand is staying in temple of Indreshwar Mahadev situated at village Dolatpara, Taluka & District : Junagadh, and was rendering service as well as doing worship in the temple. Along with him, deceased worshipper Manubhai, Kishangiri, Ratanben and 5 to 10 other persons were also staying in the temple and were rendering service and doing worship. The appellant was earlier asked to whitewash the temple. The incident in question had taken place on January 5, 1994. Four to five days prior thereof, the appellant was entrusted the work of grazing cows belonging to the temple and was staying in the temple. It was noticed by deceased Manu Maharaj and others that the behaviour of the appellant was objectionable and that he was uttering abuses. Under the circumstances, deceased Manu Maharaj had asked the appellant to leave the temple on January 5, 1994. The appellant had accordingly left the temple in the morning of January 5, 1994, but come back to the temple at about 2.30 P.M. At that time, the deceased was taking rest near seat of Guru; whereas Ratanben was busy with work in kitchen and Kishangiri Maharaj was sleeping in the garden located behind the temple. At that time, Ratanben had heard shouts of deceased Manu Maharaj asking

her to save him. On hearing the shouts, Ratanben had gone to the place where the deceased was taking rest. She had noticed that the appellant was assaulting the deceased by means of a pestle. Ratanben had made an attempt to rescue deceased Manu Maharaj, but the appellant had given her a push, as a result of which she had fallen down on the ground. Thereupon, Ratanben had also raised shouts asking Bhavnanand to come and save deceased Manu Maharaj. On hearing the shouts, Bhavnanand had also rushed to the place where the deceased was being assaulted by the appellant and witnessed that two blows on chest of the deceased with pestle were given by the appellant. Bhavnanand had caught hold of the pestle which was in the hand of the appellant and tried to know from the appellant as to why he had assaulted the deceased. The appellant had not given any reply, but run away from the place of incident after uttering abuses. Meanwhile, Kishangiri, who was also in the temple, had come to the place where the deceased was assaulted. The deceased had informed Bhavnanand that he was given blow on chest by the appellant. At the time of incident, one Megha was also staying in the temple. He was asked to bring a rickshaw. In rickshaw the deceased was removed to the dispensary of Dr.Vallabhbhai. On examination of the deceased, Dr.Vallabhbhai had found that the deceased had sustained serious injuries and had advised Bhavnanand and others to remove the deceased to Government Hospital for treatment. Accordingly, the deceased was taken to Government Hospital, Junagadh. During the course of treatment the deceased expired at about 4.30 P.M. Thereupon, Bhavnanand had lodged complaint at Junagadh Taluka Police Station. After registering offences against the appellant, the Police Station Officer had handed over complaint to Mr.D.S.Bhatti, who was then discharging duties as Police Sub-Inspector, for investigation. The investigating officer had made arrangement for sending dead body of the deceased for postmortem examination and also drawn panchnama of place of occurrence from-where the pestle used by the appellant to assault the deceased was recovered. The investigating officer had recorded statements of persons who were found conversant with the facts of the case and arrested the appellant. On conclusion of investigation, the appellant was chargesheeted in the Court of learned Chief Judicial Magistrate, Junagadh of the offences punishable under Sections 302, 504, 323 I.P.C. as well as Section 135 of the Bombay Police Act. As the offence punishable under Section 302 I.P.C. is exclusively triable by a Court of Sessions, the case against the appellant was committed to Sessions Court, Junagadh for trial, where it was numbered as Sessions Case No.52 of 1994. The learned Additional

Sessions Judge, Junagadh, to whom the case was made over for trial, had framed charge against the appellant at Exh.1 of the offences punishable under Sections 323, 302, 504, 449, 450 & 452 I.P.C. The charge was read over and explained to the appellant, who had pleaded not guilty to the same and claimed to be tried. The prosecution had, therefore, examined (i) Bhavnanand Guru Narmadanand as PW.1 at Exh.13, (ii) Dr.Bhagwatiprasad Sukhrambhai Nimavat as PW.2 at Exh.15, (iii) Ratanben Guru Bhavnanand as PW.3 at Exh.17, (iv) Dr.Vallabhbhai Tejabhai Sorathia as PW.4 at Exh.18, (v) Virjibhai Jivabhai as PW.5 at Exh.19, (vi) Mansukhlal Gaurishanker Joshi as PW.6 at Exh.21, (vii) Dr.Bhalchandra Narmadashanker Joshi as PW.7 at Exh.24, and Diwansing Sudhakarsing Bhatti as PW.8 at Exh.27, to prove its case against the appellant. The prosecution had also produced documentary evidence, such as inquest panchnma at Exh.10, map of place of incident at Exh.11, complaint lodged by Bhavnanand at Exh.14, postmortem notes of the deceased at Exh.16, panchnama of place of occurrence at Exh.20, entry from register maintained at the Police Station at Exh.22, outdoor medical papers relating to the deceased at Exh.25 etc. in support of its case against the appellant.

3. After recording of evidence of prosecution witnesses was over, the learned Judge had explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code. In his further statement, defence of the appellant was that he was not present in the temple when the incident had taken place and was falsely involved in the case. However, he had neither examined himself nor examined any witness in support of the defence pleaded by him in his further statement.

4. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the deceased had died a homicidal death. According to the learned Judge, testimony of witness Bhavnanand and that of witness Ratanben was reliable as as well as trustworthy, which established that the appellant had caused death of the deceased by inflicting blow with pestle on his chest. It was held by the learned Judge that the appellant was irritated and had assaulted the deceased after committing house-trespass. According to the learned Judge, it could not be proved by the prosecution that the appellant had given a push to witness Ratanben and/or had also pushed the complainant and caused simply injuries to them. What was noticed by the learned Judge was that the appellant

had committed house-trespass in order to commit offence punishable with death as well as with imprisonment for life and, therefore, he was liable to be convicted of the offences punishable under Sections 449 & 450 I.P.C. In view of the abovereferredto conclusions, the learned Judge has convicted the appellant of the offences punishable under Sections 302, 449, 450 & 452 I.P.C. and imposed sentences referredto earlier by judgment dated August 13, 1996, giving rise to instant appeal.

5. Ms.Shilpa J.Unwalla, learned counsel of the appellant, contended that the claim of witness Bhavnanand that he had witnessed assault on the deceased by the appellant is doubtful, inasmuch as his testimony shows that first of all Ratanba had gone to the rescue of the deceased, but was found lying, after which he had gone to the rescue of the deceased, but before that, assault on the deceased was over and, therefore, the learned Judge was not justified in acting upon the testimony of witness Bhavnanand. According to the learned counsel of the appellant, witness Bhavnanand had no opportunity to witness the incident at all, as causing of injury to the deceased was over before the witness had gone to the place of incident and, therefore, his claim that he had witnessed the incident should have been disbelieved by the trial Court. The learned counsel of the appellant referredto oral dying declaration made by the deceased before witness Bhavnanand and pleaded that if the witness had seen the incident, it was not necessary for the deceased to make so-called oral dying declaration before him and, therefore, evidence led by witness Bhavnanand regarding oral dying declaration of the deceased should be discarded. It was maintained by the learned counsel of the appellant that the oral dying declaration referredto in substantive evidence of witness Bhavnanand differs in material particulars from the averments made in the complaint; whereas witness Ratanben does not referto so-called oral dying declaration of the deceased made before witness Bhavnanand and, therefore, the learned Judge was not justified in placing reliance on the dying declaration of the deceased while convicting the appellant of major offences. It was argued that testimony of Bhavnanand does not get support from the medical evidence on record, inasmuch as according to him, the deceased had sustained injury on left side; whereas medical evidence on record shows that the deceased had sustained injuries on right side, and as this discrepancy is not explained by the prosecution, prosecution case against the appellant should have been disbelieved. After referringto the testimony of witness Ratanben, it was argued that PW.1-Bhavnanand has stated that blows

were given to the deceased when he had reached the place of incident; whereas testimony of Ratanben shows that after she had fallen down, P.W.1 had come and thereafter blows were given to the deceased and as evidence of two eye witnesses contradicts each other, the learned Judge was not justified in convicting the appellant of serious offences. It was further argued that rigor mortis had set in, which would indicate that the incident must have taken place prior to six hours of autopsy of dead body of the deceased and, therefore, claim of the prosecution witnesses that the appellant had fatally wounded the deceased at about 2.30 P.M. should have been disbelieved by the trial Court. It was pointed out to the Court that though testimony of Dr.Vallabhbhai shows that the deceased had also made dying declaration before him involving the appellant in the crime, the same is not reliable at all because in so-called dying declaration it was mentioned by the deceased that he was given 3 to 4 blows with pestle by the appellant on his chest; whereas only one injury was found during the course of autopsy of dead body of the deceased. The learned counsel of the appellant drew the attention of the Court to the testimony of Dr.Bhalchandra and argued that though the deceased had mentioned history of assault to the doctor, it was never stated by the deceased that the appellant had caused injury to him and non-mentioning of name of the appellant as his assailant was fatal to the prosecution case. It was argued that the evidence on record has not been appreciated by the learned Judge of the trial Court in its true perspective and, therefore, the appeal should be accepted. In the alternative, it was pleaded that the evidence on record does not show that the appellant had brought pestle with him while entering the temple and that a scuffle had ensued between him and the deceased, as a result of which the appellant had inflicted one blow with pestle on the chest of the deceased and, therefore, the appellant would be liable to be convicted of the offence punishable under Section 304 Part-I of the Indian Penal Code. The learned counsel emphasised that by this time the appellant has undergone sentence of more than 10 years and, therefore, after altering conviction of the appellant from Section 302 to Section 304 Part-I I.P.C. punishment of imprisonment already undergone by the appellant should be imposed on him.

6. Mr.Sudhansu S.Patel, learned A.P.P., argued that testimony of witness Bhavnanand and witness Ratanben is not only reliable, but thoroughly consistent, which establishes beyond reasonable doubt that the appellant had inflicted pestle blow on the chest of the deceased,

as a result of which, the deceased had died and, therefore, no error was committed by the learned Judge of the trial Court in acting upon the testimonies of two eye witnesses for convicting the appellant. The learned counsel of the State Government contended that minor discrepancies appearing in the testimonies of eye witnesses do not affect the substratum of prosecution case and is result of power of observation of the witnesses as well as lapse of time between the date of incident and recording their evidence and, therefore, it is wrong to contend that the Court should discard the evidence of two eye witnesses because of minor discrepancies appearing in their evidence. According to the learned A.P.P., the deceased had not noticed that the incident in question was witnessed by witness Bhavnanand and, therefore, naturally he had made oral dying declaration before the said witness, which cannot be regarded as unreliable. What was asserted by the learned counsel of the State Government was that the testimony of witness Bhavnanand regarding oral dying declaration made by the deceased to him stands corroborated by reliable testimony of witness Ratanben as well as medical evidence on record, which shows that the deceased was conscious till few minutes of his death and, therefore, no error was committed by the learned Judge in acting upon the oral dying declaration of the deceased for convicting the appellant of the offence punishable under Section 302 I.P.C. According to the learned A.P.P., there is no material discrepancy in the testimonies of two eye witnesses relating to blows given by the appellant with pestle on the chest of the deceased and, therefore, well-reasoned findings recorded by the trial Court should be upheld by this Court. The learned counsel of the State Government brought to the notice of this Court relevant fact that time of onset of rigor mortis varies greatly in different cases, but the average period of its onset may be regarded as three to six hours after death in temperate climates, and it may take two to three hours to develop, but in India, it usually commences in one to two hours after death and, therefore, the fact that the doctor who had performed autopsy on dead body of the deceased had noticed that rigor mortis had seton at 6.15 P.M. would not make any dent in the prosecution case, inasmuch as the evidence on record establishes that the deceased had died at 4.30 P.M. on January 5,1994, whereas postmortem examination was begun at 6.15 P.M. While dealing with comment offered by the learned counsel of the appellant with reference to testimony of Dr.Vallabhbhai, it was argued by the learned counsel of the State Government that his assertion that the deceased had made oral dying declaration before him involving the

appellant as his assailant inspires confidence and the same should be acted upon, more particularly when it could not be established by the defence that Dr.Vallabhbhai had a motive to implicate the appellant falsely in such a serious case. Dealing with comment of learned counsel of the appellant to the effect that the deceased had failed to name the appellant as his assailant while stating history of assault before Dr.Bhalchandra Joshi, it was urged by the learned A.P.P. that it was not customary for doctor to record name of the assailant and failure on the part of the deceased to mention name of the appellant as his assailant does not affect the reliable and trustworthy testimonies of two eye witnesses. The learned counsel emphatically pleaded that finding recorded by the learned Judge of the trial Court to the effect that the appellant was author of injury caused to the deceased is eminently just and should be upheld by this Court. In answer to alternative plea raised by the learned counsel of the appellant, it was argued that the appellant had given blow with pestle which was heavy in weight with a great force on vital part of the deceased viz. chest and in view of medical evidence which establishes that the injury was sufficient in ordinary course of nature to cause death of the deceased, the conclusion drawn by the learned Judge of the trial Court that the appellant had committed offence punishable under Section 302 I.P.C. should be upheld by this Court. It was also argued that having regard to the nature of evidence adduced by the prosecution witnesses, conviction of the appellant of the offences punishable under Sections 449 & 450 I.P.C. cannot be regarded as erroneous and, therefore, the appeal should be dismissed.

7. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. The fact that the deceased had died a homicidal death is not in dispute. The two eye witnesses have maintained before the Court that the deceased had sustained injuries on his chest in an assault mounted by the appellant on the deceased. The injuries sustained by the deceased are also noted in inquest report. Dr.Bhagwatiprasad S.Nimavat, who had conducted autopsy on dead body of the deceased, has mentioned injuries noticed by him which were sustained by the deceased in his substantive evidence. Those injuries are also detailed in postmortem notes produced on record of the case at Exh.16. The doctor has opined that injuries sustained by the deceased were antemortem. According to the doctor, cause of death of the deceased was shock due to haemorrhage as a result

of injury to lung. It is not the case of the appellant that the deceased had sustained suicidal injuries nor could it be proved by the appellant that the deceased had sustained injuries as noticed by the doctor in an accident, though a feeble attempt was made. On reappreciation of evidence, this Court finds that it is proved by the prosecution beyond reasonable doubt that the deceased had died a homicidal death. The finding recorded by the learned Judge of the trial Court on this point is eminently just and is hereby upheld.

8. This brings the Court to consider the question whether the appellant had caused injuries to the deceased. The testimony of witness Bhavnanand recorded at Exh.13 would indicate that on the date of incident he was present in the temple along with Ratanben and Kishangiri Maharaj. According to him, after taking meal, all were taking rest and the deceased was taking rest near seat of Guru; whereas he was taking rest under a tree. What is maintained by the witness in his examination-in-chief is that first of all he had heard shouts raised by the deceased to the effect that "Ratan Save, Ratan Save" and thereafter he had heard shouts raised by Ratanben for help. It is further stated by the witness that on hearing the shouts, he had gone to the place where the deceased was taking rest and found that the appellant had delivered two blows with pestle on the chest of the deceased. According to this witness, he had caught hold of pestle which was in the hands of the appellant and when he had tried to know from the appellant as to why he had assaulted the deceased, the appellant had uttered abuses and fled the temple. The witness has further asserted that the deceased had told him that the appellant had given blows on his chest. In his cross-examination, the witness stated that after he had gone to the place where the deceased was taking rest, the appellant had given one blow and that he had caught hold of the appellant. The suggestion made by the defence that he had not witnessed giving of blows by the appellant to the deceased was emphatically denied by him. In his cross-examination, the witness had maintained that the appellant had given 2 to 3 blows with pestle on the chest of the deceased when he had reached near the deceased. According to this witness, the injury sustained by the deceased was not bleeding one and that the deceased had some breathing problem. However, it was maintained by the witness that the deceased had orally told him that the appellant had given blows on his chest. It was also mentioned by the witness that the deceased had sustained injuries on the left side of his chest. On reappreciation of evidence of witness Bhavnanand, this

Court finds that there are no major contradictions appearing in his evidence with reference to his complaint or police statement. His case that he had seen the appellant inflicting two blows with pestle on the chest of the deceased stands probablised in view of testimony of Dr.Nimavat examined at Exh.15, who has stated before the Court that according to his opinion the deceased must have been given two blows. The assertion made by this witness that the deceased had made oral dying declaration before him implicating the appellant also inspires confidence because the evidence of Dr.Bhalchandra clinchingly establishes beyond pale of doubt that the deceased was conscious when he was admitted in hospital and had narrated history of assault to him. The plea that the deceased would not have made dying declaration before this witness, as he had witnessed the incident in question is merely stated to be rejected. It could not be brought on record by the defence that the deceased was knowing that assault on him by the appellant was witnessed by witness Bhavnanand. Naturally, therefore, on finding Bhavnanand, who was his Guru, near him, the deceased had informed him that he was assaulted by the appellant. Thus, making of oral dying declaration is not, in any way, suspicious at all. It may be stated that it could not be brought on record by the defence that this witness had any enmity with the appellant. Under the circumstances, false implication of the appellant in such a serious case stands ruled out. The witness has narrated the incident and stated relevant facts in a natural manner and, therefore, his evidence inspires confidence of this Court.

9. So also, testimony of witness Ratanben Guru Bhavnanand, examined at Exh.17, would show that at the time of incident she was making preparation to have bath, but on hearing shouts raised by the deceased, she had gone to the place where the deceased was taking rest and found that the appellant was assaulting the deceased. According to this witness, he had asked the appellant to come down, as the appellant had mounted on the chest of deceased while assaulting him, but the appellant had given a push to her, as a result of which she had fallen down on the ground and raised shouts seeking help of her Guru i.e. Bhavnanand. The witness has, in no uncertain terms, maintained that on shouts being raised by her, her Guru had come to the place of incident and had snatched pestle which was in the hands of the appellant, after which the appellant had run away. The witness has informed the Court that the appellant was coming to the temple off and on, but it was not true that he was permitted to stay because he was a gentleman. A

suggestion was made to the witness by the defence that when she had gone to the place where the deceased was taking rest, she had found that the appellant was pulling hair of the deceased, but was not inflicting blows and to this suggestion the witness had agreed. The witness had also agreed to the suggestion made by the defence to the effect that at that time the pestle was not in the hands of the appellant, but was lying near the deceased. It was admitted by the witness that the appellant had not inflicted blows on the deceased when she had fallen down, but maintained that before she had fallen down, the appellant had inflicted blows to the deceased. The suggestion made by the defence that she had not witnessed the incident was emphatically denied by her. In cross-examination, it was maintained by this witness that she had seen the appellant inflicting blows on the deceased when Bhavnanand had come to the rescue of the deceased. This witness had informed the Court that the deceased had sustained injuries on right side of his chest.

10. On reappreciation of evidence of these two witnesses, this Court finds that there are some contradictions as to when infliction of blows was witnessed. However, they are inconsequential and of no importance. It is rightly pointed out by the learned A.P.P. that minor discrepancies noticed in the evidence of two eye witnesses is result of power of their observation and passage of time after which their evidence was recorded before the Court. Witness Ratanben had also no reason to falsely implicate the appellant in such a serious case. She has also narrated the incident in most natural manner. Her presence at the time and place of incident can hardly be doubted. In fact, the suggestion made by the defence to this witness that at the time when she had reached near the deceased, she had found that the appellant was pulling hair of the deceased, but was not inflicting blow, would indicate that presence of the appellant at the time and place of incident was never a subject matter of challenge and was, in fact, admitted by the defence. Though alibi was pleaded as a defence by the appellant, no attempt was made by the appellant to probablise the same. It is not the case of the appellant that either Bhavnanand or Ratanben or any other inmate of the temple was on inimical terms with the deceased and had assaulted the deceased. The claim made by the two witnesses that the appellant had assaulted the deceased with a pestle inspires confidence of this Court and deserves to be accepted. On reappreciation of evidence, this Court finds that both the witnesses had ample opportunity of

witnessing the assault mounted by the appellant on the deceased and it is wrong to contend that neither witness Bhavnanand nor witness Ratanben had, in fact, witnessed the incident in question.

11. There is yet another relevant piece of evidence on record which deserves a special reference. Dr.Vallabhbhai Tejabhai Sorathia, examined at Exh.18, was a medical practitioner at village Dolatpara. His evidence would show that Bhavnanand and others had brought the deceased in a rickshaw and that on examining the deceased he had found that the deceased had sustained serious injuries and, therefore, he had advised Bhavnanand and others to remove the deceased to Civil Hospital for treatment. The witness has, in terms, maintained before the Court that he had asked the deceased as to how he had sustained injuries and the deceased had informed him that the appellant had given 3 to 4 blows with pestle to him. Though this witness was cross-examined by the defence, his assertion that the deceased had made oral dying declaration before him could not be demonstrated to be untrue. The oral dying declaration cannot be regarded as untrue because of the fact that the deceased had sustained only one injury, but had told witness Dr.Vallabhbhai that he had sustained 2 to 3 injuries. As observed earlier, Dr.Nimavat, who has performed autopsy of the dead body of the deceased, had stated in his testimony very clearly that the deceased must have sustained at least two injuries. Even if it is believed by the Court that some exaggeration was made by the deceased while making oral dying declaration before witness Dr.Vallabhbhai, that fact by itself would not discredit the doctor, as he has referred to the declaration of the deceased as was made to him. It could not be brought on record by the defence that Dr.Vallabhbhai had any dispute with the appellant and was out to implicate the appellant falsely in such a serious case. Further, the testimony of Dr.Bhalchandra Joshi, who had opportunity of treating the deceased as an outdoor patient, would show that the deceased was conscious when he was admitted in the hospital. Thus, the assertion made by Dr.Vallabhbhai that the deceased had made oral dying declaration before him implicating the appellant as his assailant inspires confidence of the Court and there is no good reason on the basis of which said assertion can be either discarded or disbelieved.

The net result of the above discussion would show that on January 5, 1994 the appellant had caused injuries on the chest of the deceased by means of a pestle and caused his death.

12. The plea that the case of prosecution should be disbelieved because the deceased had failed to name the appellant as his assailant while stating history of assault before Dr.Bhalchandra Joshi is merely stated to be rejected. It is well settled that a Medical Officer is not expected to know from the injured as to who were his assailants. Normally, history of assault is ascertained by the Medical Officer so that well defined line of treatment can be chalked out. The effect of non-mention of names of assailants before Medical Officer is examined by the Supreme Court in two leading decisions i.e. (i) Pattipati Venkaiah v. State of Andhra Pradesh, A.I.R.1985 SC 1715, Paragraph 17, and (ii) P.Babu & Ors. v. State of Andhra Pradesh, (1994)1 SCC 388 at page 392. The Supreme Court has settled this controversy by holding that failure on the part of the injured to mention names of his assailants before Medical Officer has no vitiating effect on prosecution case, nor does it affect credibility of other reliable and cogent evidence on record. Therefore, non-mention of name of the appellant by the deceased before Dr.Bhalchandra N.Joshi is of little consequences. However, recording of history of assault by the Medical officer, as narrated by the deceased, would also show that the deceased was conscious and able to state relevant facts.

13. This brings the Court to consider the question as to which offence is committed by the appellant. Neither the testimony of witness Bhavnanand nor the testimony of witness Ratanben shows that the appellant had come to the temple at 2.30 P.M. on January 5, 1994 with any arm. In fact, witness Bhavnanand has admitted in terms that the pestle used in commission of crime by the appellant was belonging to the temple. Therefore, first relevant fact which deserves to be noticed by the Court is that the appellant had not armed himself while coming to the temple. The testimony of witness Mansukhlal Gaurishanker Joshi, PW.6 recorded at Exh.21, would show that on January 5, 1994 he was on duty as P.S.O. of Junagadh Taluka Police Station and at about 6.15 hours he had received a telephonic message from Dr.Joshi that Manu Maharaj of Indreshwar Temple had received injuries in a scuffle and that he was admitted in Surgical Ward of the Hospital. The witness has stated that after entry was made in the register, Dr.Joshi had informed him that Manu Maharaj had expired. Thus, testimony of this witness would show that a scuffle had taken place between the appellant and the deceased. Even investigating officer Mr.Bhatti has stated that when he was on duty as P.S.I. of Junagadh Taluka Police Station, he had received an

information from P.S.O. to the effect that Dr.Joshi had informed him by D.O.letter that in a scuffle deceased had sustained injuries and was admitted in Junagadh Civil Hospital, as a result of which he had gone to hospital with his staff members. Thus, case of scuffle between the appellant and the deceased is stated by prosecution witnesses and the prosecution wants the Court to believe these witnesses because they are neither treated hostile nor were they confronted with their previous statements. As noticed earlier, testimony of witness Ratanben shows that she had agreed to the suggestion of the defence that at the time when she had reached near the deceased, the appellant had caught hold of hair of the deceased, but had not given blow, which means that a scuffle had taken place between the appellant and the deceased. The prosecution could not lead any evidence before the Court as to why the scuffle had taken place between the appellant and the deceased. The averments made in the complaint, which stand proved through the testimony of witness Bhavnanand, would indicate that the appellant had picked up pestle which was lying near the deceased and given one blow on the chest of the deceased. Thus, the evidence on record does not establish that with an intention to commit murder of the deceased, the appellant had armed himself with deadly weapon and entered the temple. The evidence on record on the contrary establishes that a scuffle had taken place between the appellant and the deceased and that the appellant had picked up pestle lying near the deceased and inflicted one blow on the chest of the deceased. The evidence on record does not establish that with premeditation the deceased had committed murder of the deceased. On the contrary, the evidence shows that in a sudden fight between the appellant and the deceased, the appellant, in the heat of passion and without having taken undue advantage of the situation or acting in a cruel and unusual manner, had inflicted one blow of pestle on the chest of the deceased which had ultimately proved fatal. Therefore, the learned Judge of the trial Court was not justified in convicting the appellant of the offence punishable under Section 302 I.P.C. The record of the case and more particularly medical evidence on record establishes beyond reasonable doubt that the appellant had caused such bodily injury to the deceased as was likely to cause his death and, therefore, the appellant would be liable to be convicted of the offence which is punishable under Section 304 Part-I I.P.C. Thus, the conviction of the appellant of the offence punishable under Section 302 I.P.C. deserves to be converted into one punishable under Section 304 Part-I I.P.C. So also, the record does not show that the appellant had committed

trespass with a view to committing an offence punishable either with death or with imprisonment for life. In fact, there is nothing on record to show that the appellant had entered the temple at 2.30 P.M. with an intention to cause death of the deceased. Therefore, conviction of the appellant of the offences punishable under Sections 449 & 450 I.P.C. also deserves to be set aside. The Court further finds that it is not necessary to impose fine while convicting an accused of an offence punishable under Section 302 I.P.C. Therefore, sentence of fine imposed on the appellant also deserves to be set aside.

14. As far as the question of sentence to be imposed on the appellant for commission of offence punishable under Section 304 Part-I I.P.C. is concerned, the learned A.P.P. has produced xerox copy of the jail remarks sheet of the prisoner for perusal of the Court which indicates that by this time the appellant has undergone imprisonment of 12 years, 2 months & 44 days with remission. Therefore, this Court is of the opinion that interest of justice would be served if the appellant is sentenced to suffer imprisonment which he has already undergone.

For the foregoing reasons, the appeal is partly allowed. Judgment dated August 13, 1996 rendered by the learned Additional Sessions Judge, Junagadh, in Sessions Case No.52 of 1994 convicting the appellant of the offences punishable under Sections 302, 449 & 450 I.P.C. and sentencing him to suffer R.I. for life and fine of Rs.2000/-, in default, R.I. for 6 months for commission of offence punishable under Section 302 I.P.C. as well as R.I. for 10 years and fine of Rs.1000/-, in default, R.I. for 3 months for commission of offence punishable under Section 449 I.P.C. and R.I. for 7 years and fine of Rs.800/-, in default R.I. for 2 months for commission of offence punishable under Section 450 I.P.C., is hereby set aside. Instead, the appellant is convicted of the offence punishable under Section 304 Part-I I.P.C. His conviction for the offence punishable under Section 452 I.P.C. recorded by the learned Judge of the trial Court is upheld. For the offence punishable under Section 304 Part-I I.P.C., the appellant is sentenced to suffer R.I.for a term which he has already undergone. For the offence punishable under Section 452 I.P.C., punishment imposed on the appellant by the learned Judge of the trial Court is substituted and he is sentenced to suffer R.I. for 3 years and fine of Rs.200/-, in default, S.I. for 15 days. The substantive sentences are ordered to run concurrently. The appellant has already undergone

the sentence imposed on him for commission of offence punishable under Section 304 Part-I I.P.C. and, therefore, if he pays the amount of fine imposed for commission of offence punishable under Section 452 I.P.C., he shall be released from Jail forthwith, unless his presence is needed with reference to any other case. Muddamal to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.)

(D.P.Buch, J.)

(patel)